SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1431

PAUL CASHEN and IRENE CASHEN,

Petitioners,

vs.

FRANK SPANN, ROBERT BICKLEY, CHARLES M. EGAN, JR., JOHN DUNNE, individually and as servant, agent or employee of CHARLES EGAN, JR., "JOHN DOE," being a fictitious name of the "Reliable Informer," NEW JERSEY BELL TELEPHONE COMPANY, ANTHONY DE BLASI, THE COUNTY OF MORRIS and the BOROUGH OF WHARTON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 74-1421

PAUL CASHEN and IRENE CASHEN,

Petitioners,

vs.

FRANK SPANN, ROBERT BICKLEY, CHARLES M. EGAN, JR., JOHN DUNNE, individually and as servant, agent or employee of CHARLES EGAN, JR., "JOHN DOE," being a fictitious name of the "Reliable Informer," NEW JERSEY BELL TELEPHONE COMPANY, ANTHONY DE BIASI, THE COUNTY OF MORRIS and the BOROUGH OF WHARTON,

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Counter-Statement of Facts

Pursuant to Rule 40, these Respondents will omit a complete counterstatement of fact but do take issue with

certain statements of the Petitioners. Initially, it is clear from the record that these Respondents did not break into the home of the Petitioners but rather carried out a search of the Petitioners' home, car and person only after the issuance of a search warrant by the Honorable Jacques Gascoyne, J.C.C., following a finding by His Honor of probable cause for same. It has nowhere been admitted that the issuance or the basis of the issuance of that warrant was "a bizarre mistake" (Pb3), and it has never been admitted nor proven, as acknowledged by Justice Pashman in *Cashen* v. *County of Morris,* 66 N. J. 541, 556 (1975), "that the information provided by the informant was erroneous." The balance of the statement of facts is largely correct, except that the alleged concessions of these Respondents as stated in Page 6 of Petitioners' Brief have never been made, and the bases of the opinions of the appellate court and the state supreme court are self-explanatory and not limited to the reasons set forth by the Petitioners.

Reasons Why the Writ Should Be Denied

POINT I

Since the Supreme Court of New Jersey did not rule that disclosure of an informer's identity could not be had in a civil case, this petition is untimely as premature.

The language of the first question presented to this Court by the Petitioners indicates a basic misinterpretation by the Petitioners of the decision rendered in the Supreme Court of New Jersey. The Petitioners view that court's holding as one which

> ". . . gives immunity not only to reliable informers, but also to informers who furnish false and libelous statements to the police under the guise of vital information to combat criminal activities." (Pb10)

This "reason for granting the Writ" (Pb9-10) is a totally incorrect conclusion drawn by the Petitioners. A simple perusal of the unanimous decision appealed from, *Cashen* v. *County of Morris,* 66 N. J. 541 (1975), reveals that no informant, reliable or otherwise, was granted immunity by New Jersey's highest court. In fact, that court recognized that certain circumstances "may require that the identity of the informant be disclosed to a party in a civil suit." 66 N. J. at 557.

As admitted by Petitioners (Pb9), our state supreme court in *State* v. *Burnett,* 42 N. J. 377 (1963) and *State* v. *Oliver,* 50 N. J. 39 (1967), has followed the very balancing test established by the United States Supreme Court in *Roviaro* v. *United States,* 353 U. S. 53 (1957).

It is difficult to understand where there are special and important reasons to grant Certiorari when not only has there been no decision in conflict with existing case law or *dicta* of the United States Supreme Court but, when as here, there is virtually no deviation from the well established "balancing process" of *Roviaro, supra.*

Justice Pashman, writing for the court below simply remanded the matter to the trial level in order to give the Petitioners and the State the necessary opportunity to have an adequate record before the court when the "delicate and difficult" balancing question *is* decided. Justice Pashman stated:

> "While we are satisfied that the Appellate Division correctly identified the balancing test to be

> applied in cases such as this one, we doubt that either the trial court or the Appellate Division has before it an adequate record to actually perform the delicate and difficult balancing of interests called for. Hence we vacate the order of the Appellate Division directing disclosure of the identity of the informant." 66 N. J. at 555.

It becomes readily apparent that the New Jersey supreme court *has not* decided whether or not the identity of the informant should be revealed. The mere fact that the court gave the trial judge certain guidelines with which to perform his function and the Petitioners' case may not squarely fit these guidelines does not give these Petitioners the standing at this juncture to have the Petition for Writ of Certiorari granted. Therefore, without a final adjudication as to whether the identity of the informant should be revealed, this court is without jurisdiction to entertain the Petitioners' claim.

POINT II

Until the courts of New Jersey decide unequivocally whether or not the identity of the informant in the instant case should be revealed, the petitioners are without standing to allege a denial of due process.

The second question presented by Petitioners (Pb2) provides an equally insufficient basis for granting the Writ. Since the New Jersey courts have not made an unequivocal determination vis-á-vis disclosure of the informer's identity in the instant case, there is no room for the Petitioners to alleged a denial of due process. In fact, upon remand the trial court may very well conclude, after employing the guidelines established by the New

Jersey supreme court below, that disclosure is warranted. Thus, until this specific question of disclosure has been judicially settled in the New Jersey courts, the Petitioners are without standing to claim a denial of due process of law.

In any event, it has been well established by this court that the constitutional guarantees of due process and confrontation are not violated by the non-disclosure of an informant where a search warrant has issued through a proper judicial procedure. *McCray* v. *Illinois*, 386 U. S. 300, 312-14 (1967). Such is especially true where the *Roviaro* tests have sufficiently tipped the scales of non-disclosure in favor of the public. *Roviaro, supra* at 60-62. That the instant case concerns a civil, not criminal, matter is of no moment for, even as the Petitioners indicate, no court had advanced a less strict standard for disclosure in a civil case.

POINT III

Although there may exist two judicial viewpoints vis-a'-vis disclosure of an informant's identity in a civil case, neither approach supports the position the petitioners would like this court to take, thus making it unnecessary for this court to decide the issue before it.

The Petitioners assert as their third reason in support of the granting of the Writ that "there is a split of authority in jurisdictions" (Pb12) and that "[t]he United States Supreme Court has never decided the issue of whether the privilege of non-disclosure of the identity of informers is applicable in civil cases . . ." (Pb12). These Respondents find no such split of authority and Justice Pashman aptly resolved this issue by stating:

". . . it is now clear that the balancing process set forth in *Roviaro* is applicable to civil as well as criminal cases. *Westinghouse Electric Corp.* v. *Burlington,* 351 F. 2d 762 (D. C. Cir. 1965):

> Appellee argues that the *Roviaro* standard would never justify disclosure in civil cases in which the Government is not a party. But the fact that the case is civil rather than criminal is not dispositive. * * * The policies behind the privilege and its exceptions extended to civil as well as criminal cases. Presumably most informers do not want their names to be revealed in either a civil or criminal proceeding. The fact that there would be a somewhat greater chance, statistically, of having their identity revealed if disclosure is required in civil cases would be unlikely to deter citizens from informing. There is no logical reason to set up two different privileges, one for civil and one for criminal cases. The defendant in a criminal case may have a greater stake than a party in a civil case, but that would not always be so: even admitting the probability of a greater risk of retaliation in a criminal case. The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure "is essential to a fair determination of a cause." [351 F. 2d at 769 (quoting *Roviaro, supra*)].

See also *Mitchell* v. *Roma,* 265 F. 2d 633 (3 Cir. 1959). *See generally* Annotation, "Application in Federal Civil Action, of Governmental Privilege of Nondisclosure of Identity of Informer," 8 *A.L.R. Fed.* 6 (1971) and cases cited therein. 66 N. J. at 554.

These Respondents find it difficult to understand what position the Petitioners have taken with regard to this

point. It would appear that the only logical argument in support of their position can be that the *Roviaro* test should *not* be applicable to civil actions. However, such an argument is nowhere advanced. Their position certainly cannot be that the rule in *Roviaro* is applicable, for that is exactly the position of the New Jersey supreme court and thus, there would be no basis for this appeal.

Likewise, it cannot be Petitioners' position that a "stricter rule" than *Roviaro* is applicable since that would be a self-defeating argument.

In any event, the only case law cited by the Petitioners relates to the possible split of opinion as to the applicability of the *Roviaro* test or a stricter standard in civil actions. The foregoing argument cannot logically be the position of the Petitioners and might well be that of the Respondents, and therefore, the fact that there may be a split of opinion or no definitive judgment by the United States Supreme Court as to whether the *Roviaro* or a stricter rule should apply in civil actions is not in issue before this court.

CONCLUSION

In conclusion, for the reasons stated above and the fact that the Petitioners have shown no special or important reason whatsoever for the court to grant this Petition for Writ of Certiorari, it is respectfully requested by these Respondents that same should be denied.

Respectfully submitted,

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